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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

12 CROSSFIT, INC., a Delaware corporation,

13 Plaintiff,

14 v.

15 NATIONAL STRENGTH AND
16 CONDITIONING ASSOCIATION, a
Colorado corporation,

17 Defendant.

CASE NO. 14cv1191-JLS(KSC)

**JOINT MOTION FOR
DETERMINATION OF DISCOVERY
DISPUTE**

Judge: The Honorable Janis L. Sammartino

The Honorable Karen S. Crawford

Courtroom: 4A

20 Pursuant to the Chamber Rules and Civil Pretrial Procedures of the
21 Honorable Karen S. Crawford (the “Chamber Rules”), Plaintiff CrossFit, Inc.
22 (“CrossFit, Inc.” or “Plaintiff”) hereby petitions the Court for resolution of certain
23 discovery disputes arising out of Defendant National Strength and Conditioning
24 Association’s (“NSCA” or “Defendant”) responses and objections (and first and
25 second supplemental responses and objections) to Plaintiff’s Requests for
26 Production and First Interrogatories, the responses and objections to document
27 subpoenas on the NSCA’s agents Dr. William Kraemer, Joan Kraemer and N.

1 Travis Triplett (collectively, the “Responses and Objections”) and related
 2 productions of documents.¹

3 **A. SCOPE OF REVIEW AND PRODUCTION**

4 **(1) Plaintiff’s Contention – Defendant NSCA and its Agents Have Not**
 5 **Undertaken an Adequate Search for Responsive Documents.**

6 In June of this year, almost six months ago, Plaintiff CrossFit, Inc. served its
 7 initial requests for production and interrogatories on the Defendant in this case.

8 *See* Serritella Decl. Exs. 1-2. In the course of extensive meet and confer sessions
 9 regarding Defendant’s general objections, it became clear that Defendant did not
 10 actually object to the majority of Plaintiff’s requests.² That makes sense, as
 11 Plaintiff’s requests were limited in duration and focused on the main issues in this
 12 case, such as the NSCA’s view of CrossFit, Inc. as a competitor, CrossFit as an
 13 exercise regime, and the NSCA’s publication of related articles. Plaintiff also
 14 served document subpoenas on the NSCA’s editors that were similar in scope to
 15 the requests for production served on the NSCA, to ensure that CrossFit, Inc.
 16 received all responsive documents. These individuals (also represented by
 17 Manning Kass, the NSCA’s counsel) did not object to the requests in substance.

18 Yet Defendant’s production to date has been sparse, at best. Based on the
 19 fact that Defendant and its agents have only produced approximately 300
 20 documents, there is good reason to think that its collection process has not located
 21 all responsive documents.³ That logical conclusion is bolstered by the fact that

22
 23 ¹ For an analysis of the legal shortcomings of Defendant’s productions, and a
 24 complete discussion of the factual and procedural background of this Motion,
 25 see Plaintiff’s Memorandum of Points and Authorities and the Declaration of
 26 Paul A. Serritella filed herewith.

27 ² Those matters in dispute have been raised to the Court in two Joint Motions for
 28 Resolution of Discovery Disputes, filed on November 3 and November 17.

³ This count is approximate, as Defendant produced multiple documents in single
 27 files, making unitization difficult. Further, it appears that Defendant’s total
 28 production includes a significant number of duplicate copies of the same
 documents.

1 Defendant's initial production excluded several known documents, such as
 2 communications from CrossFit, Inc. to the NSCA, or documents related to the
 3 NSCA's consideration of other articles about CrossFit. After Plaintiff raised the
 4 sufficiency of Defendant's production efforts, Defendant committed to re-
 5 collecting and produce responsive documents. But even after the NSCA and its
 6 agents have made supplemental productions, they have still collectively produced
 7 only a handful of emails and supporting documents.

8 Discussions with Manning Kass, counsel for the NSCA and its agents, has
 9 revealed that the document collection process was flawed. Counsel placed its trust
 10 in non-attorney employees to determine whether they possessed responsive
 11 documents, to search their own email and document repositories, and to collect
 12 information (such as the editorial history of relevant articles) from third-party
 13 custodians. *See* Serritella Decl. ¶ 22. Counsel has not verified that these searches
 14 were done diligently, let alone using proper techniques and tools. Further, counsel
 15 does not appear to have reviewed the productions that were made, detected
 16 inconsistencies with other productions or known facts (as set forth below), or
 17 pressed its client to resolve these inconsistencies.

18 These shortcomings further underscore the importance of counsel's failure to
 19 engage an e-discovery vendor or otherwise take forensically sounds steps to collect
 20 and preserve native documents, as noted in the parties' November 17 Joint Motion.
 21 *See* Joint Motion (Dkt. No. 30) at 3-4. Doing so would not only have allowed
 22 Defendant to comply with the Court's order regarding the form in which electronic
 23 documents must be produced, but it would also have imposed a level of rigor on
 24 the collection and review process. Simply put, Defendant did not collect full email
 25 archives from an appropriately selected group of custodians likely to have
 26 responsive documents, and it did not use a proven tool to apply relevant search
 27 terms and date filters uniformly to such a population of documents. Had counsel
 28 done so, it then would have been able to review a culled set of materials that would

1 likely contain documents responsive to CrossFit, Inc.'s document requests. Such a
 2 process is absolutely standard in commercial litigation. It is, in fact, the process
 3 followed by CrossFit, Inc. in this matter.⁴

4 The impact of Defendant's failure to follow generally accepted practices for
 5 collecting and producing documents is reflected not only in the pitifully small
 6 number of documents the NSCA and its agents have produced, but also in their
 7 failure to produce documents that undoubtedly exist. For example:

8 - A CrossFit, Inc. representative sent an email to the NSCA on May 23,
 9 2013 pointing out the falsity of the data contained in the Devor Article
 10 sent. *See* Serritella Decl. Exs. 18-19. Emails discussing this
 11 communication are responsive to – at least – RFP Nos. 2 (all documents
 12 concerning to CrossFit) and 7 (all documents concerning the Devor
 13 Study). Yet the NSCA at first did not locate and produce that email at all
 14 (although it comes from the CrossFit.com domain). When Plaintiff
 15 inquired in a meet-and-confer why the May 23 email itself hadn't been
 16 produced – let alone any internal correspondence about it – Defendant
 17 produced just two internal email chains attaching the email. Putting aside
 18 the implausibility of the NSCA having only two emails discussing an
 19 accusation that its journal published a study containing false data, the two
 20 documents themselves reveal that other responsive documents exist.
 21 Each of the documents is a chain of emails sent to multiple recipients. At
 22
 23

24 ⁴ Defendant notes that CrossFit, Inc., has not yet produced documents in this matter.
 25 However, CrossFit, Inc. did not receive the NSCA's discovery requests until September 10,
 26 2014 – almost three months after Plaintiff served its requests. Since then, CrossFit, Inc.
 27 retained an electronic discovery vendor to collect and process electronic documents. After
 28 the vendor ran search terms on approximately 2,500,000 documents that it collected, counsel
 reviewed over 15,000 for responsiveness and privilege. Responsive, non-privileged
 documents are now being processed for production pursuant to the standards set out in the
 Court's electronic discovery order, and CrossFit, Inc. anticipates producing documents prior
 to December 24, 2014. *See* Serritella Decl. ¶ 24.

the very least, there should be copies of the individual emails that constitute each of the chains.

- The NSCA has not produced documents and communications relating to the Hak Article (other than the article itself), which would be responsive to Plaintiff's RFP No. 23. Although the RFP clearly relates to "all documents and communications concerning" the article, and although the parties specifically discussed the need to produce the editorial history as part of the meet and confer process, the NSCA did not produce these documents. The NSCA has subsequently stated that the editorial history materials are in the possession of its printer, and that it is working to obtain them. As an initial matter, the NSCA's printer is its agent, and such documents are therefore well within its possession, custody, and control. Moreover, the printer was not disclosed in Defendant's Initial Rule 26 disclosures as a custodian of relevant documents. Finally, it is implausible that every single document concerning the Hak Article would be in the printer's possession, and that the NSCA and its Journal of Strength and Conditioning Research would not possess a single responsive email.
- Counsel has not produced personal emails from N. Travis Triplett, one of the Devor Article editors (along with the Kraemers), stating that all of her responsive documents are stored on the "Editorial Manager" system. Counsel has represented that it conferred with Ms. Triplett and that she has no responsive emails; it also produced a statement (apparently from Ms. Triplett) that she does not have any communications related to the Devor Article or Study. However, Defendant also produced emails from Ms. Kraemer copied to "triplttnt@appstate.edu." Serritella Decl. Ex. 17. Thus, it appears that Ms. Triplett was sent responsive documents and did not perform an adequate search for them. Although CrossFit has now

1 obtained the documents sent to Ms. Triplett by Ms. Kraemer, the fact that
 2 Ms. Triplett did not locate them raises the question of what other
 3 documents she may not have located.

4 - Counsel has not produced any documents and communications for Dr.
 5 William Kraemer or his wife, Joan Kraemer, related the CHAMP Study
 6 and paper. *See* Serritella Decl. ¶ 18. It has failed to do so
 7 notwithstanding the fact that Dr. Kraemer was a co-author of the
 8 CHAMP paper. Such documents would relate to RFPs No. 2 (documents
 9 related to CrossFit) and 22 (documents related to the CHAMP paper),
 10 among others, and the Kraemer document subpoenas. Counsel has
 11 represented that it has produced all responsive documents from Dr. and
 12 Ms. Kraemer. However, third-party productions and communications
 13 indicate that there was an extensive email traffic – including emails to
 14 and from Dr. Kraemer – regarding the drafting of the CHAMP paper.

15 While in its response below Defendant makes much of the fact that it is in
 16 the process of obtaining Editorial Manager files, that is a red herring. Such files
 17 will not remedy Defendant's deficient production. Even if the Editorial Manager
 18 actually does contain all communications generated during the editing process,
 19 Defendant cannot with a straight face claim that it would contain all responsive
 20 documents. Documents unrelated to the editorial process would not be stored in
 21 the Editorial Manager. Such materials would include email communications about
 22 CrossFit in general and how the NSCA views CrossFit, Inc. as a competitor,
 23 communications prior to the inception of an Editorial Manager file for a given
 24 article, and communications about CrossFit, Inc.'s notice to the NSCA that the
 25 Devor Article contained falsified data. Further, Defendant does not explain the six
 26 month delay in seeking the Editorial Manager files.

27 CrossFit therefore respectfully requests that this Court compel the NSCA
 28 and its agents to undertake a comprehensive review of its documents, overseen by

1 counsel and with full transparency as to which resources are being collected, and
 2 which search terms are being used, to ensure that no documents responsive to the
 3 Requests for Production (and subpoenas on the individual editors) have been
 4 missed.

5 (2) Defendant's Response

6 Upon service of the Demand for Production of Documents by plaintiff
 7 CrossFit, counsel for the defendant NSCA undertook the extensive task of
 8 evaluating the propriety of the various requests, and determining whether
 9 applicable objections and privileges applied. Counsel for the NSCA, who is based
 10 in San Diego, conferred with its client, the NSCA, which is based in Colorado, to
 11 address each of the specific requests set forth in the Demand and to develop the tasks
 12 to search for, collect, and provide to counsel all documents responsive to the
 13 requests. Counsel and the NSCA engaged in extensive exchanges of information
 14 and conferences to determine the scope of the universe of documents which
 15 potentially could be responsive. The same process was utilized to obtain
 16 cooperation from the Kraemers (who were based in Connecticut) and Ms. Triplett
 17 (who is based in North Carolina) with regards to the Rule 45 subpoenas. (See
 18 Declaration of Kenneth S. Kawabata, Para. 2]

19 The NSCA itself was not involved in the editorial process for the manuscript
 20 submission by the Devor Article authors (nor for submissions of any other
 21 manuscripts). All communications related to the editorial process are set forth in
 22 the Editorial Manager, which is a web-based system over which the NSCA has no
 23 proprietary interest. Thus, the NSCA itself cannot access the documents housed
 24 within the Editorial Manager. For example, no one at the NSCA can use a user
 25 name and password to access the communications related to any of the manuscript
 26 editorial processes. The NSCA must rely on the editors for its Journal for access.
 27 In responding to the Demand for Production of Documents, the NSCA obtained the
 28 Editorial Manager through the editors for the JSCR. [See Kawabata Declaration,

1 Para. 3].

2 At this stage, the NSCA is in the process of completing its meet and confer
 3 with CrossFit in order to produce documents so as to comply with the ESI Order.
 4 The NSCA has recently obtained the cooperation of the publisher of the JSCR (an
 5 entity separate and apart from the NSCA) to obtain the communications within the
 6 Editorial Manager in a native format so as to comply with the ESI Order. The
 7 NSCA expects to achieve compliance shortly. It should be noted that while
 8 CrossFit has served its written response to the NSCA's Demand for Production of
 9 Documents, CrossFit has not served its documents; counsel for CrossFit has
 10 advised that it is still going through the documents and no documents have been
 11 produced by CrossFit. [See Kawabata Declaration, Para. 4].

12

13

Respectfully submitted,

14

Dated: December 18, 2014

<p>15 LATHAM & WATKINS LLP</p> <p>16</p> <p>17</p> <p>18 By: <u>/s/ Paul A. Serritella</u> 19 Paul A. Serritella 20 (pro hac vice)</p> <p>21 885 Third Avenue 22 New York, New York 10022-4834 23 Telephone: (212) 906-1200 24 Facsimile: (212) 751-4864 25 <i>paul.serritella@lw.com</i></p> <p>26</p> <p>27</p> <p>28</p>	<p>15 MANNING & KASS, ELLROD, 16 RAMIREZ, TRESTER LLP</p> <p>17</p> <p>18 By: <u>/s/ Kenneth S. Kawabata</u> 19 Kenneth S. Kawabata 20 (Bar No. 149391)</p> <p>21 550 West C Street, Suite 1900 22 San Diego, CA 92101 23 Telephone: (619) 515-0269 24 Facsimile: (619) 515-0268 25 <i>ksk@manningllp.com</i></p> <p>26 <i>Counsel for Defendant National 27 Strength & Conditioning 28 Association</i></p>
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2 Pursuant to Section 2(f)(4) of the Electronic Case Filing Administrative
3 Policies and Procedures of the United States District Court for the Southern
4 District of California, I certify that the content of this document is acceptable to
5 counsel for the Defendant and that I have obtained authorization from Kenneth S.
6
7 Kawabata to affix his electronic signature to this document.
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9
10

/s/ Paul A. Serritella

11 Paul A. Serritella
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PROOF OF SERVICE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CROSSFIT, INC. v. NATIONAL STRENGTH AND CONDITIONING
ASSOCIATION,

District Court Case No. 14-cv-1191-JLS(KSC)

9 I, Paul A. Serritella, hereby certify that I am over the age of eighteen and not
10 a party to the within action; I am employed by Latham & Watkins LLP in the
11 County of New York at 885 Third Avenue, New York, New York 10022.

12 On December 18, 2014, I served the document below described as:

**JOINT MOTION FOR DETERMINATION OF DISCOVERY
DISPUTE**

The document(s) was/were served by the following means:

- **BY ELECTRONIC TRANSMISSION VIA NEF:** I hereby certify that I electronically filed the foregoing document(s) with the Clerk of Court using the CM/ECF system, which sent Notifications of Electronic Filing to the persons at the e-mail addresses listed immediately below. Accordingly, pursuant to the Court's Local Rule 5.4(c), I caused the document(s) to be sent electronically to the persons listed immediately below.

23 I declare under penalty of perjury under the laws of the United States
24 of America that the foregoing is true and correct.

25 | Executed on December 18, 2014 at New York, New York.

/s/ Paul A. Serritella

Paul A. Serritella

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CROSSFIT, INC. v. NATIONAL STRENGTH AND CONDITIONING
ASSOCIATION,

District Court Case No. 14-cv-1191-JLS(KSC)

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